



DATE DOWNLOADED: Fri Dec 11 03:40:04 2020

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Citations:

Bluebook 21st ed.

Jameelah Omar, D. J. Steyn, Questioning: The Undefended Accused - Practical Examples for Magistrates, 133 S. AFRICAN L.J. 460 (2016).

ALWD 6th ed.

Omar, J. ., D. j. steyn, questioning: The undefended accused - practical examples for magistrates, 133(2) S. African L.J. 460 (2016).

APA 7th ed.

Omar, J. (2016). D. j. steyn, questioning: The undefended accused practical examples for magistrates. South African Law Journal, 133(2), 460-463.

Chicago 7th ed.

Jameelah Omar, "D. J. Steyn, Questioning: The Undefended Accused - Practical Examples for Magistrates," South African Law Journal 133, no. 2 (2016): 460-463

McGill Guide 9th ed.

Jameelah Omar, "D. J. Steyn, Questioning: The Undefended Accused - Practical Examples for Magistrates" (2016) 133:2 S African LJ 460.

AGLC 4th ed.

Jameelah Omar, 'D. J. Steyn, Questioning: The Undefended Accused - Practical Examples for Magistrates' (2016) 133(2) South African Law Journal 460.

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Omar, Jameelah. "D. J. Steyn, Questioning: The Undefended Accused - Practical Examples for Magistrates." South African Law Journal, vol. 133, no. 2, 2016, p. 460-463. HeinOnline.

OSCOLA 4th ed.

Jameelah Omar, 'D. J. Steyn, Questioning: The Undefended Accused - Practical Examples for Magistrates' (2016) 133 S African LJ 460

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D J Steyn *Questioning: The Undefended Accused — Practical Examples for Magistrates*. 2nd edition. LexisNexis (Pty) Ltd. 2014. Volume 1A R777.00 (soft cover) and Volume 2 R777.00 (soft cover).

Questioning: The Undefended Accused — Practical Examples for Magistrates ('the Volumes') is a practical guide primarily for magistrates (as the title suggests), but is also a helpful resource for public prosecutors, legal representatives and law students. It 'aims to facilitate a quick-reference guide regarding criminal law, the law of evidence and the law of criminal procedure, blended together in a practical approach' (Preface to Volume 1A). The Volumes provide a legal framework for specific offences such as assault, robbery, fraud, forgery, extortion, corruption and perjury, and a corresponding pro forma that describes either the explanation the magistrate must give the undefended accused, the information with which the accused must be provided, or the line of enquiry which the magistrate must follow. The explanations of the specific offences include simple definitions, requirements, and statutory or case references. The Volumes include in each chapter examples of concrete problems that are likely to be encountered in court, and how the law and procedure must be employed to resolve those complications. The Volumes aim to provide simple explanations for the relevant rules and concepts that will allow the subject-matter to be digestible and usable in the courtroom context. It succeeds as a quick-reference guide by excluding academic or theoretical debates while nevertheless expanding on some commonly encountered, but nuanced concepts that are not always easy to interpret or apply. One such example appears on page 135 of Volume 1A, where a discussion is provided about what is meant by the concept of 'grievous bodily harm'. The link to the use of a dangerous weapon is made clearly by the corresponding pro forma sheet (pro forma 'L' on page 34 of the pro forma compendium), which contains the enquiry a magistrate ought to conduct in relation to alleged violations of the Firearms Control Act 60 of 2000.

Section 35 of the Constitution of the Republic of South Africa, 1996 enshrines the right to a fair trial, which includes the rights in s 35(3)(f) 'to choose, and be represented by, a legal practitioner, and to be informed of this right promptly', and s 35(3)(g) 'to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly'. Many criminal accused are unrepresented by legal practitioners (Jeremy Sarkin 'Restructuring the legal profession and access to justice: The duty of law graduates and lawyers to provide legal services' (1993) 8 *SAJHR* 223). It would be impossible to enumerate all the reasons why this is so, but the fact that some accused do not trust legal services may provide one reason why an accused would choose not to make use of a legal representative, even at state expense (M J Motubatse *Protection of the Rights of an Undefended Accused* (unpublished LLM Thesis, University of Limpopo, 2014). The fact that an unrepresented accused has waived legal representation at the expense of the state, however, should not be to the disadvantage of the accused. The court has a

constitutional injunction to protect and promote the rights of an unrepresented accused. As is correctly indicated in Volume 1A, the starting point of these rights is the court's duty to inform an accused at his or her first appearance of the right to legal representation in terms of s 35 of the Constitution. This starting point sets an important premise from which the remainder of the Volumes proceed — that there is a duty on magistrates to assist an unrepresented accused in order to give effect to the right to a fair trial.

A well-established maxim which is foundational to the legitimacy and effective functioning of the criminal justice system is that justice must be done and justice must be seen to be done. When magistrates are appointed, they have to take an oath that includes the equal application of justice to all. The oath, which appears in s 9(2)(a) of the Magistrates' Courts Act 32 of 1944, is as follows:

'I, (full name) do hereby swear/solemnly affirm that in my capacity as a judicial officer I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.'

By following the process set out in the Volumes, magistrates can ensure that they are administering the law fairly and equitably to all people who appear before them, thereby respecting and upholding their oath of office. In terms of s 9(1) of the Constitution, 'everyone is equal before the law and has the right to equal protection and benefit of the law'. An accused must be protected from prejudice and bias, and judicial officers must impartial in order for an accused to have a fair trial (*Motubatse op cit* at 13). A key problem in the magistrates' courts is that there is no way of ensuring that procedures are correctly implemented: judgments are not reported, and the practice in one jurisdiction may be substantially different to another. The Volumes provide an innovative way of ensuring that the same enquiries could be conducted of accused persons, and the same information could be given to accused persons by providing a process-flow approach to handling a number of matters in court, including appraising the accused of his or her right to legal representation and conducting a trial involving specific criminal offences.

Even more importantly, the pro formas provided in the compendium binders allow for a clear record to be kept of the proceedings. Magistrates are provided a pro forma sheet, and if they follow it step-by-step, this would ensure that the magistrate provides the accused with relevant information, and that the answers provided by the accused would be recorded in writing on the pro forma. This could create a new method of record-keeping in the magistrates' courts, and it is even possible that these completed sheets could form part of the court record. In the event of an appeal or review, besides obtaining a record of the audio recording (which is not always available in every court, and which can be troublesome to obtain), such documents would be helpful at least in evaluating whether the rights of the accused were adequately complied with.

There is a danger that having pro formas for questioning accused may mean that magistrates are not willing to be flexible in their approach to, and questioning, of accused persons. The danger of limitation of discretion would undoubtedly be a factor should these practical examples be aimed at judges, but instead is somewhat mitigated by its focus on magistrates. Considering that magistrates are creatures of statute, bound by the Magistrates' Courts Act and its rules, and that the bulk of criminal cases are heard in the magistrates' courts, it is suggested that a more rigid process would be more beneficial as a general rule for undefended accused persons than having no guidelines or processes at all.

The Volumes are equally helpful to other legal practitioners, such as prosecutors and attorneys. Although defence attorneys are not present at these proceedings relating to undefended accused (by definition), attorneys may be involved in providing advice on a matter prior or after the matter proceeding to court and they could conveniently obtain relevant information from the Volumes. Legal Aid lawyers, who are directly involved in the day-to-day running of criminal matters in the magistrates' courts, would also find the Volumes a helpful reference guide for dealing with specific offences that frequently arise, and in ensuring that a defended accused's constitutional rights are recognised at each step of the proceedings. Prosecutors could equally find value in the Volumes since they are the *dominus litis* in a criminal process, and as officers of the court also have a duty to ensure that the matter follows correct procedures and the accused's rights are reinforced (see JJJoubert *Criminal Procedure Handbook* 11th ed (2014) 71). The Volumes at relevant points also refer to the rights of victims, seeing that they are important parties to the criminal process in their own right. For example, under the chapter on the offence of assault with intent to do grievous bodily harm, pages 122–3 clearly articulate the rights in the Constitution that relate to a victim of a crime.

Criminal law, criminal procedure and the law of evidence are in my experience more often than not taught theoretically rather than practically. The Volumes could provide a valuable service in filling that practical void for a law student, and provide a useful step-by-step guide to the practical criminal trial process. For example in courses which have a mock trial or moot component, law students would find the explanations, practical examples and pro formas helpful in preparing for a trial exercise. Of additional value is that the author has included an integrated discussion of the relevant criminal law, procedure and evidentiary principles relating to a specific offence. These areas of law are ordinarily taught separately, and each course largely has its own set of distinct textbooks available. In practice, students and young practitioners therefore tend to struggle to draw together the theoretical essentials of each area of law in a composite practical trial process. The Volumes achieve this extremely well. For example, in the chapter on *crimen iniuria*, the Volumes discuss the substantive criminal law theory of the offence as well as the criminal-procedure aspect of splitting of charges in relation to this offence (Volume 1A at 203–4). Additionally, Volume 2 includes the evidentiary aspects related to the offence of fraud (at 102).

Other than magistrates, the single most important constituency that would find value in the use of the Volumes are the unrepresented accused persons themselves. As previously stated, legal representation is simply not available for the vast majority of the population (Sarkin *op cit* at 223). Furthermore, the resources of the Legal Aid South Africa simply cannot provide services to all persons who cannot afford legal assistance. Accused persons awaiting trial, for example, have said that lawyers from Legal Aid South Africa are often only available for consultation a few minutes before the matter appears in court, and that at that point there is no time for an extensive consultation. Accused persons also have no real knowledge about what information they need to convey to their representative during those crucial minutes. (See the transcripts of consultations personally conducted with remand detainees at Pretoria Central Correctional Centre in 2013 as part of the Centre for Applied Legal Studies project in the Rule of Law Programme, on file with the author of this review.) The simple and clear explanations of the law as well as the easily accessible statutory and case law references contained in the Volumes would be helpful to remand detainees.

There are a few specific aspects that do not appear in the Volumes, but which I suggest could usefully be included in later editions. The most obvious and important of these relates to the bail proceedings of an accused person, particularly where the person has not yet been formally charged. An unrepresented accused would definitely require assistance in knowing what to say at the bail hearing, as well as a clear explanation that the record forms part of the trial record, so that anything that the accused admits in the bail hearing could be used against them at trial. More importantly, magistrates themselves often need to be reminded of the two-part analysis that a magistrate is required to follow in determining the appropriateness of bail and, thereafter, the bail conditions themselves, if bail is deemed appropriate. Unfortunately, many magistrates conflate the two processes. The result can often be that an amount is set for monetary bail that is abstracted from the economic conditions of the accused, and alternative (non-monetary) bail conditions are not considered (see Centre for Applied Legal Studies Report 6 (2013) 'A measure of last resort: Research report on remand detention in South Africa'). At its heart, bail is not a punitive measure (*S v Stanfield* 1997 (1) SACR 221 (C) at 233i); however, bail that is centred on a monetary amount may penalise those who have limited financial means. If the Volumes were to include a step-by-step process for magistrates to follow, this could increase the fairness of bail hearings and perhaps promote the use of non-monetary bail conditions in appropriate cases. According to the Preface, Volume 1 is published in two parts, 1A and 1B. At the time of writing this review, Volume 1B was not available. Perhaps Volume 1B will cover some specific-offence gaps and the pre-trial processes that also require adequate legal representation (see s 35(2)(b) and (c) of the Constitution).

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